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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA
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9 GARRICK HARRINGTON,

CASE NO. 1:05-cv-00624-OWW-GSA PC

10 Plaintiff,

ORDER DENYING PLAINTIFF'S MOTION
TO PRECLUDE DEFENDANTS FROM
MOVING TO MODIFY THE SCHEDULING
ORDER AND FOR DEFAULT

11 v.

12 A. K. SCRIBNER, et al.,

(Doc. 48)

13 Defendants.

ORDER DENYING PLAINTIFF'S MOTION
FOR LEAVE TO FILE A LATE OPPOSITION
TO DEFENDANTS' MOTION TO MODIFY
THE SCHEDULING ORDER

16 (Doc. 49)

17 ORDER DENYING DEFENDANTS' MOTION
FOR MODIFICATION OF THE SCHEDULING
ORDER TO FILE A LATE MOTION FOR
SUMMARY JUDGMENT

19 (Doc. 47)
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22 Plaintiff Garrick Harrington ("Plaintiff") is a state prisoner proceeding pro se and in forma
23 pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on
24 Plaintiff's amended complaint, filed April 28, 2006, against Defendants Hicks, Furholdt, Wood, and
25 Lowden for violating the Eighth Amendment, and against Defendants Yamamoto, Poulos, and
26 Scribner for violating the Equal Protection Clause.

27 Pursuant to the Court's scheduling order filed on July 9, 2007, the deadline for filing pretrial
28 dispositive motions was May 14, 2008. On May 19, 2008, Defendants filed a motion for leave to

1 file a late motion for summary judgment, along with the proposed motion. The Court denied the
2 motion on December 12, 2008, on the grounds that Defendants did not support their motion with any
3 evidence, did not make a showing of due diligence, and did not offer any explanation for their failure
4 to file the motion on or before May 14, 2008, as required under the Court's scheduling order. The
5 denial was without prejudice to renewal within thirty days.

6 On December 23, 2008, Defendants renewed their motion, supported by counsel's
7 declaration. On December 29, 2008, Plaintiff filed a motion requesting that Defendants be
8 precluded from moving to modify the scheduling order to allow for a late summary judgment motion
9 and for default. On March 11, 2009, Plaintiff filed a motion for leave to file a late response to
10 Defendants' December 23 motion to modify the scheduling order.

11 Plaintiff's March 11 motion is denied. Defendants' December 23 motion was deemed
12 submitted when Plaintiff did not file an opposition or a statement of non-opposition within twenty-
13 one days. Local Rule 78-230(m). Plaintiff has provided no explanation for his failure to previously
14 timely oppose the motion, and Plaintiff has provided no explanation why he waited almost three
15 months before seeking an extension of time.

16 Plaintiff's December 29 motion is also denied. Parties are permitted to seek modification
17 of the scheduling order, as Plaintiff was previously informed. Fed. R. Civ. P. 16(b)(4). Defendants
18 have the right to seek modification of the scheduling order, and Plaintiff has set forth no argument
19 that would support precluding them from doing so. Further, Defendants are not in default. Fed. R.
20 Civ. P. 55.

21 Finally, a scheduling order may be modified. However, modification of the pretrial
22 scheduling order requires a showing of good cause. Fed. R. Civ. P. 16(b)(4). "The schedule may
23 be modified 'if it cannot reasonably be met despite the diligence of the party seeking the extension.'"
24 Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1087 (9th Cir. 2002) (quoting Johnson
25 v. Mammoth Recreations, Inc., 975 F.2d 604, 607 (9th Cir. 1992)). The prejudice to Plaintiff, if any,
26 may be considered, but the focus is on Defendants' reasons for seeking the modification. Johnson,
27 975 F.2d at 609. If Defendants were "'not diligent, the inquiry should end' and the motion to modify
28 should not be granted." Zivkovic, 302 F.3d at 1087 (quoting Johnson at 609).

1 Defendants have explained what happened to cause the delay in filing their motion.
2 However, the scheduling order was issued more than ten months before. Defendants have not
3 explained why there was inadequate time to comply or why they failed to file a motion seeking an
4 extension of time prior to the motion deadline, as required by the scheduling order. The Court finds
5 that under these circumstances, Defendants have not shown due diligence, and their motion to
6 modify the scheduling order is denied.

7 Based on the foregoing, it is HEREBY ORDERED that:

- 8 1. Plaintiff's motion for leave to file a late opposition to Defendants' motion to modify
9 the scheduling order, filed March 11, 2009, is DENIED;
- 10 2. Plaintiff's motion for an order precluding Defendants from filing a motion to modify
11 the scheduling order and for default, filed December 29, 2008, is DENIED;
- 12 3. Defendants' motion for modification of the scheduling order to file a late motion for
13 summary judgment, filed December 23, 2008, is DENIED; and
- 14 4. If any party wishes to seek reconsideration of any part of this order, the motion for
15 reconsideration must be directed to the Honorable Oliver W. Wanger.

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18 IT IS SO ORDERED.

19 **Dated: March 12, 2009**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE